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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-986

ROBERT BRYAN CRESTFIELD,
Petitioner

v.

TEXAS,
Respondent

BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Comes now the State of Texas, Respondent, by and through its Attorney General, and files this brief opposing the granting of a Writ of Certiorari.

Respondent could quarrel with some aspects of the facts set forth in Petitioner's Statement of the Case but prefers to simply rely upon the facts set forth in the opinion of the Texas Court of Criminal Appeals (reported at 471 S.W.2d 50 and set forth *in haec verba* in the appendix to the Petition herein at p. 11).

Point 1 (Restated from Petition)

Where a state court rules over objection that testimony from the arresting officer is admissible on rebuttal that an unidentified third party informed the officer in Petitioner's presence and while Petitioner was under arrest that Petitioner had been trying to sell LSD pills earlier in the day,

is such evidence so prejudicial as to deprive Petitioner of a fair trial by an impartial jury in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

At the trial petitioner testified and raised the question of his "knowledge" that he possessed prohibited drugs. On rebuttal the State offered testimony that Petitioner offered to sell the pills in question in order to show that Petitioner *did* "know" that he had the pills in his possession. An objection was made to such testimony on two specific grounds, i.e., relevancy and hearsay.

As pointed out in the opinion of the Court of Criminal Appeals, neither of these grounds was valid. Evidence showing guilty knowledge is relevant even though it may also show or tend to show the commission of another crime. *Wagner v. State*, 463 S.W.2d 432 (Tex.Crim., 1971); *William v. State*, 441 S.W.2d 853 (Tex.Crim., 1969).

As to hearsay, statements made in the presence of an accused are admissible as an exception to the hearsay rule. An early landmark decision to this effect is *Johnson v. State*, 84 S.W. 824 (Tex.Crim., 1905), wherein the court stated:

> "While the witness Blythe was testifying in behalf of the state, he was permitted to state, 'I heard George Wilson say to defendant, after the killing that night, "Nannie, you have killed Della," and defendant turned around, and did not say anything.' The objection urged to this testimony was its incompetency. . . . But we believe this testimony was clearly admissible. It occurred but a short time after the homicide, and was a direct accusation to her, charging her with the commission of the offense. . . . "

Later that same year, in *Barton v. State*, 90 S.W. 877 (Tex.Crim., 1905), the court further stated:

> ". . . Now, if the defendant was not present, he could not be bound by any acts or declarations of third parties after the consummation of the conspiracy. However, any act or declaration of defendant, either prior or subseqquent to the consummation of the conspiracy or crime, showing guilt, *or any declaration in the presence of appellant*, either prior or subseqquent to the crime, that showed guilt, was provable. But declarations of third parties, not made in his presence, are not admissible." (Emphasis added.)

And in *Davis v. State*, 40 S.W.2d 808 (Tex.Crim., 1931), the following appears and would seem most appropriate to the instant cause:

> "We have no doubt of the admissibility of the testimony of the witness Jeffus to the effect that Hawkman said, in the presence and hearing of appellant, and at a place down in the woods on a branch where there were various wooden and iron barrels, 'We are going to make some whisky.' . . . That there were no other persons present, except appellant, Hawkman, and the witness, appears. What was said by Hawkman in the presence and hearing of appellant was sufficient to call for a denial by him, and, in the absence of a denial, might be binding upon him."

In its opinion the Court of Criminal Appeals pointed out that although some objection was made to the introduction of a statement by a third party as being hearsay, no objection was made concerning the fact that Petitioner was under arrest and that the third party statement (together with Petitioner's silence) would be barred as an improper confession. The opinion then held that the lack of such objection constituted a waiver. If a proper contemporaneous objection had

been made, the trial court could have taken the necessary steps to cure the error or declare a mistrial, whichever might have been proper. Petitioner cannot now be heard to complain. Furthermore, federal law permits the introduction of oral statements made under arrest. Since we are here concerned with the equivalent of an oral confession (an admission by silence), even though it might be properly excluded by Texas law, no federal question is presented.

Point 2 (Restated from Petition)

Did the arresting officer's contradictory testimony as to the reason for arresting Petitioner evince merely a pretext for searching his person, in violation of the Fourth Amendment's prohibition against unreasonable searches?

The Texas Court of Criminal Appeals reviewed the record and specifically held that the arrest was lawful and also the search incident thereto. In so doing the court applied the facts to Section 28-2 of the City Ordinances of the City of Houston and construed the applicability of such Ordinance. This construction is binding on Federal Courts under *Erie v. Tompkins*, 304 U.S. 64 (1938).

Respondent further asserts that Petitioner's attempt to say that Petitioner was three or four feet removed from the restaurant area and that such would render the arrest illegal not only flies into the teeth of the holding of both the trial court and the appellate court but also such contention would be at best a defense to the charge of violating the city ordinance and would not render the arrest any less on probable cause than if he had been sprawled in the center of the restaurant area. Since the record reflects that the arresting officer reasonably believed that Petitioner was vio-

lating the law in his presence the arrest was legal. Under Petitioner's theory he could just as logically say that he was not really "sleeping" but just temporarily closed his eyes and thus avoid the legality of the arrest.

As to Petitioner's contention that there was some apparent conflict in portions of Officer Mayberry's testimany, it would seem to be eminently more appropriate that such conflict (if any existed) should more properly be settled in the trial court (a fact finding forum) than in the Supreme Court of the United States.

WHEREFORE, PREMISES CONSIDERED, Respondent urges that review by Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Howard M. Fender, Assistant Attorney General of Texas, a member of the bar of the Supreme Court of the United States, hereby certify that a copy of the Brief in Opposition to the Granting of a Writ of Certiorari to the Court of Criminal Appeals of Texas was served on the attorney for the Petitioner by depositing same in the United States Mail, postage prepaid, certified mail, on this the ____ day of April, 1972, addressed as follows: Mr. Ben G. Levy, 2244 W. Holcombe Blvd., Houston, Texas 77025.

HOWARD M. FENDER
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